

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

THOMAS GAMBUCCI,

Plaintiff,

V.

TED CHEPOLIS, *et al.*,

Defendants.

CASE NO. C16-1302RSM

## ORDER GRANTING MOTIONS TO DISMISS

## I. INTRODUCTION

This matter comes before the Court on the following motions:

- 1) Defendants Philip Jennings's, Henry Dean's, R. Bruce Johnston's and Emanuel Jacobowitz's Motion to Dismiss and Motion for Reconsideration of Order Granting In Forma Pauperis Status to Plaintiff (Dkt. #17); and
- 2) Defendant Ted Chepolis's Motion to Dismiss (Dkt. #19).

The Defendants ask the Court to dismiss all claims against them as time-barred, or alternatively, as precluded by the doctrines of *res judicata* and/or issue preclusion or under 18 U.S.C. § 1915(g) as frivolous and malicious. Dkts. #17 and #19. Plaintiff opposes the motions arguing that his claims are not time barred, and that they are not barred by the doctrine of *res judicata*. Dkts. #26 and #27. The Court has reviewed the parties' pleadings, along with the

1 Declarations and Exhibits filed in support thereof, and now GRANTS Defendants' motions for  
2 the reasons stated herein.

## 3 II. BACKGROUND

4 Plaintiff Gambucci filed the instant matter on August 17, 2016. He is proceeding *pro*  
5 *se*, and has been granted leave to proceed *in forma pauperis*. Dkt. #4. Plaintiff is currently a  
6 defendant in a Skagit County Superior Court case, entitled *DEEC, Inc. v. C. Hugh Jonson and*  
7 *Thomas Gambucci*, involving the same parties as the instant matter. *See* Dkt. #12. The instant  
8 matter is also related to another case that had been proceeding in this Court, *Jonson v.*  
9 *Chepolis, et al.*, Case No. C16-1220RSM. *Id.* Before this Court, and like Mr. Jonson's  
10 allegations in *Jonson v. Chepolis*, Plaintiff Gambucci alleges various violations of the  
11 Computer Fraud and Abuse Act ("CFAA"), *inter alia*, against Defendants. Dkt. #5.  
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14 Plaintiff Gambucci alleges that in 2013, he met Mr. C. Hugh Jonson while he  
15 (Gambucci) was being employed as a consultant and investigator for Attorney John Cochran.  
16 Apparently, Attorney Cochran represented Mr. Jonson during that time, and Mr. Gambucci  
17 understood that Mr. Jonson's primary business was in Trucking and Marine industry. Dkt. #5  
18 at § IV.1. Mr. Gambucci asserts that Attorney Cochran introduced him to Mr. Jonson to assist  
19 with a real estate matter involving the foreclosure of Mr. Jonson's home in Washington. *Id.*  
20 According to Mr. Gambucci, he became interested in Mr. Jonson assisting him with a truck  
21 stop concept that he had designed for a real estate development he planned to commence in  
22 Fort Myers, Florida, on a property owned by another client of Mr. Gambucci's. *Id.* Mr.  
23 Gambucci drafted a business plan which included Mr. Jonson as a director, as well as potential  
24 partner in the development of the truck stop in Florida. *Id.* Mr. Gambucci then offered Mr.  
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1 Jonson a position in the new company being formed to develop the truck stop, which Mr.  
2 Gambucci had named DieselAire. Dkt. #5 at § IV.1.

3 According to both Mr. Gambucci and Mr. Jonson, Mr. Jonson was formerly the owner  
4 of a Washington corporation known as DEEC, Inc. (“DEEC”). *Id.*; Case C16-1220RSM, Dkt.  
5 #1 at ¶ IV. 1. Mr. Jonson asserts that in October or November of 2013, he asked Defendant  
6 Chepolis to build a website (DEECWorldwide.com) and create an associated email address for  
7 him. Case C16-1220RSM, Dkt. #1 at ¶ IV. 1. He alleges that Mr. Chepolis agreed to build and  
8 maintain the website along with an email for him, for which he would compensate Mr.  
9 Chepolis by gifting a portion of his royalties on the sales of DEEC products.<sup>1</sup> *Id.* Mr. Jonson  
10 alleges that it was during this process when Mr. Chepolis became aware of his email password.  
11 Case C16-1220RSM, Dkt. #1 at ¶ IV. 2. Mr. Gambucci also alleges these facts. Dkt. #5 at §  
12 IV.1.  
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15 Mr. Jonson alleges that in April of 2014, Defendant Dean asked Mr. Chepolis to  
16 “monitor” Plaintiff’s email. Case C16-1220RSM, Dkt. #1 at ¶ IV. 4. Mr. Jonson alleges that  
17 on April 21, 2014, Mr. Chepolis obtained an email from his (Jonson’s) email account that was  
18 addressed to Mr. Cochran, Mr. Gambucci and a Mr. Michael Pfeiffer. *Id.* at ¶ IV. 5. The email  
19 apparently contained an acceptance by Mr. Jonson to Mr. Gambucci’s offer to join the Board of  
20 Directors at Mr. Gambucci’s truck stop business in Florida. *Id.* at ¶ IV. 9. Mr. Jonson states  
21 that Mr. Chepolis then brought the email to Defendants Dean and Jennings, and the email,  
22 which contained some negative statements about Mr. Dean, angered Mr. Dean. *Id.* at ¶ IV. 6.  
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25 Mr. Jonson alleges that, as a result, Mr. Dean terminated his (Mr. Jonson’s) employment as

26 <sup>1</sup> In prior state court proceedings, Mr. Chepolis has stated that he is a Shareholder in DEEC,  
27 Inc. and that he is the registered owner of the deecworldwide.com domain, which he manages  
28 for DEEC on dedicated server space that he leases from a commercial server host. Case C16-  
1220RSM, Dkt. #15, Ec. C at ¶ ¶ 2-3. Neither Mr. Jonson nor Mr. Gambucci dispute those  
facts. Dkt. #5 at § IV.; Case C16-1220RSM, Dkt. #1 at ¶ IV. 2.

1 President of DEEC, Inc. Mr. Gambucci alleges that he had never met, nor had any business  
2 dealings with, any of the Defendants until the alleged email interception. Dkt. #5 at § IV.1.

3 Lawsuits in the Washington State Superior Court for Skagit County followed. DEEC,  
4 Inc. apparently sued Mr. Jonson and Mr. Gambucci, and Mr. Jonson and another of his  
5 companies (Jonson Tug and Salvage Company) apparently sued DEEC and the current  
6 individual Defendants in the instant lawsuit. *See* Dkt. #15, Exs. A-C. Those cases were  
7 consolidated in the Skagit County Superior Court and eventually claims and counterclaims  
8 involving Mr. Jonson were dismissed with prejudice. Dkts. #9, Ex. A and #15, Ex. B. As to  
9 Mr. Gambucci, it appears the state court matter is still pending.  
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11 During the state law matter, the Court found the following facts:  
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- 13 • DEEC, Inc. is a technology research and development company that keeps  
14 proprietary, confidential business information including at least research and  
15 development information, designs, drawings, plans, schematics, blueprints,  
16 equipment specifications, and technical data related to a diesel engine emissions  
17 control system known as the Oxy-Hydro System, and production models and  
18 early production units for that system;  
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- 20 • Mr. Jonson signed a non-disclosure agreement with DEEC, Inc. dated December  
21 3, 2012, in which among other things he acknowledges that DEEC, Inc.'s  
22 confidential business information of the sort described above was developed or  
23 acquired at significant effort or expense, is a valuable special and unique asset of  
24 DEEC, Inc.'s, and provides DEEC, Inc. with a significant competitive  
25 advantage;  
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- 1 • Mr. Jonson and several co-assignors transferred and assigned all of their rights,  
2 title, and interest in this intellectual property irrevocably to DEEC, Inc. by  
3 written agreement dated February 26, 2013;
- 4 • DEEC, Inc. lawfully terminated Mr. Jonson as an officer and employee no later  
5 than April 2, 2014, and ordered him to leave the premises and not return;
- 6 • Prior to April 2, 2014, Mr. Jonson was notified in writing no later than March 6,  
7 2014 that he was not an officer, director, employee, or agent of Plaintiff and  
8 must cease to represent himself as such;
- 9 • On April 16, 2014, Mr. Jonson persuaded DEEC, Inc.'s landlord to give him  
10 access to DEEC, Inc.'s leased premises, whereafter Mr. Jonson changed the  
11 locks and excluded DEEC, Inc. from the premises, for the purpose of seizing  
12 some of the above-described proprietary, confidential business information  
13 and/or products;
- 14 • While on the premises, Mr. Jonson communicated with Mr. Gambucci regarding  
15 the organization of a new business formed by Mr. Jonson after his termination  
16 with a very similar name to DEEC, Inc.'s name – “DEEC Worldwide, Inc.” – a  
17 name that implied Mr. Jonson intended to compete with DEEC, Inc. for its  
18 known customers or potential customers in the sale or licensing of the diesel  
19 engine emission control technology assigned by Mr. Jonson to DEEC, Inc.; and  
20 • Mr. Gambucci subsequently confirmed in correspondence and declaration that  
21 he and Mr. Jonson intend to market similar products to DEEC, Inc.'s in  
22 competition with DEEC, Inc., and that he recently contacted a distributor of  
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DEEC, Inc.'s, resulting in that distributor canceling an order for DEEC, Inc.'s product.

Case No. C16-1220RSM, Dkt. #18-1.

Mr. Jonson subsequently filed an action against the same parties in this Court. C16-1220RSM. Days later, Plaintiff Gambucci filed this matter, alleging various violations of the Computer Fraud and Abuse Act by the same Defendants involved in his state court law suit. Dkt. #5. Defendants then filed the instant motions. Defendants Dean, Jennings, Jacobowitz and Johnston have also filed a separate motion for sanctions, which remains pending and will be addressed in a different Order.

### III. DISCUSSION

#### A. Untimely Responses

As an initial matter, the Court addresses Defendants' request that Mr. Gambucci's Response briefs be stricken as untimely. Dkts. #30 at 2-3 and #33. Defendants' motions to dismiss were noted for consideration by this Court on October 14, 2016, making any Response brief due no later than October 11, 2016 (as Monday, October 10<sup>th</sup> was a holiday). Local Civil Rules 6(a) and 7(d)(3). Mr. Gambucci's Responses were not filed until October 12, 2016, making them one day late. However, given the Court's conclusions below, even if the Court considers the Responses, Defendants' motions would still be granted. Accordingly, the Court declines to strike Mr. Gambucci's Response briefs, despite their untimely filing.

#### B. Legal Standard for Motions to Dismiss

On a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38

1 (9th Cir. 1996). However, the Court is not required to accept as true a “legal conclusion  
2 couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*  
3 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The Complaint “must contain sufficient factual  
4 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 678. This  
5 requirement is met when the Plaintiff “pleads factual content that allows the court to draw the  
6 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Absent facial  
7 plausibility, Plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

9        Though the Court limits its Rule 12(b)(6) review to allegations of material fact set forth  
10 in the Complaint, the Court may consider documents for which it has taken judicial notice. *See*  
11 F.R.E. 201; *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). Here, the Court has  
12 taken judicial notice of and considers herein the documents filed in the related state court  
13 action, which are matters of public record and/or have been incorporated in the Complaint by  
14 reference therein. *See* Dkts. #5; Case No. C16-1220RSM, Dkt. #15, Exs. A-B and #18, Exs. 1-  
15 10; *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).

### 18 **C. Statute of Limitations**

19        Defendants first move to dismiss the claims against them as barred by the applicable  
20 statute of limitations. Dkts. #17 at 14-15 and #19 at 2-3. Mr. Gambucci brings claims against  
21 Defendants under the civil provisions of the Computer Fraud & Abuse Act, 18 U.S.C. § 1030,  
22 the Stored Communications Act, 18 U.S.C. § 2707, and the Wire Tap Act, 18 U.S.C. § 2520.  
23 Each of these statutes provides a two-year statute of limitations for any civil action. 18 U.S.C.  
24 § 1030(g); 18 U.S.C. § 2520(e); 18 U.S.C. § 2707(f). Mr. Gambucci alleges in his Complaint  
25 that his claims are based solely on the event that occurred on April 21, 2014, when Mr.  
26 Chepolis allegedly wrongfully intercepted an e-mail between him and Mr. Johnson. Thus, the  
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1 deadline to file any action under the aforementioned statutes was April 22, 2016. Mr.  
2 Gambucci did not file the instant action until August 17, 2016, after the statute of limitations  
3 had run.

4 Mr. Gambucci asserts that he did not learn of the email “interception” until the end of  
5 August 2014, and therefore filed his Complaint within the applicable limitation period. Dkts.  
6 #26 and #27. That assertion is belied by the record. Indeed, in an email to Defendants and  
7 others on June 9, 2014, Mr. Gambucci states, “. . . what is the shit about your stealing my email  
8 not being a CRIME, ha ha, you are full of it.” Dkt. #18-3. Mr. Gambucci further states, “And  
9 in the event of any settlement offer to Hugh or Jonson Tug, I hope you will send me the  
10 CROOKS that got my e-mail or you and your company as well as its investors will not forget  
11 my name or DIESELAIRE! I promise!” Dkt. #18-3. Thus, even if Mr. Gambucci is given the  
12 benefit of some type of “discovery” rule, his own admissions support that he learned of the  
13 email event before June 9, 2014, making his Complaint filed in August of 2016 outside the  
14 statute of limitations. Accordingly, the Court agrees with Defendants that Mr. Gambucci’s  
15 claims are time barred, and Defendants’ motions will be GRANTED. Because the Court finds  
16 Mr. Gambucci’s claims to be barred by the statute of limitation, it will not address Defendant  
17 Dean’s, Jennings’s, Johnston’s and Jacobowitz’s alternate theories for dismissal.  
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#### 21 IV. CONCLUSION

22 Having reviewed Defendants’ Motions to Dismiss, the oppositions thereto, and replies  
23 in support thereof, along with the remainder of the record, the Court hereby finds and  
24 ORDERS:  
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- 26 1. Defendants Jennings’s, Dean’s, Johnston’s and Jacobowitz’s Motion to Dismiss  
27 (Dkt. #17) is GRANTED. All claims brought by Plaintiff Gambucci against  
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1 Defendants Jennings, Dean, Johnston and Jacobowitz are DISMISSED WITH  
2 PREJUDICE.

3 2. Defendant Chepolis's Motion to Dismiss (Dkt. #19) is GRANTED. All claims  
4 brought by Plaintiff Gambucci against Defendant Chepolis are DISMISSED WITH  
5 PREJUDICE.

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7 3. This matter is now CLOSED.

8 4. The Court will issue a separate Order on the remaining motion for sanctions.

9 DATED this 15 day of November, 2016.

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12 RICARDO S. MARTINEZ  
13 CHIEF UNITED STATES DISTRICT JUDGE  
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